No. 15624

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN E. BRADFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,
ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,
LEILA F. BULGRIN,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee,
United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES PAGE

TEXTBOOK

No. 15624

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN E. BRADFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

On December 19, 1956 an indictment was filed against appellant in which the Grand Jury for the Southern District of California charged him in two counts with violations of Section 174 of Title 21, U. S. C. Count One charged him, in effect, with unlawfully selling and facilitating the sale on August 28, 1956 of approximately 350 grains of heroin which, as the defendant then and there well knew, had been imported into the United States contrary to law. Count Two charged a similar offense with respect to August 31, 1956 and 325 grains of heroin.

The District Court had jurisdiction of the cause under Section 3231 of Title 28, U. S. C., which confers on all District Courts original jurisdiction "of all offenses against the laws of the United States."

The trial of the above matter commenced on March 28, 1957 before the Honorable Ernest A. Tolin, judge presiding. On April 10, 1957 the jury returned a verdict of guilty as charged in each of the two counts. On April 26, 1957, the defendant was sentenced to the custody of the Attorney General on Count One for fifteen years and on Count Two for fifteen years, the terms to run consecutively for a total of 30 years.

On or about May 2, 1957, a Notice of Appeal to this Honorable Court was filed. Thereafter an order was signed permitting the appeal to proceed *in forma pauperis.* The appeal was docketed and Appellant's Opening Brief filed.

Jurisdiction of this Court stems from Section 1291 of Title 28, U. S. C.

II.

The Statute Under Which Appellant Is Being Prosecuted.

The indictment in this case was brought under Section 174 of Title 21, U. S. C. which provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III.

Statement of the Case.

The sequence of events in this case with respect to those matters pertinent to the issues on appeal is as follows:

On Thursday, March 28, 1957, the jury was selected and the case commenced before the Honorable Ernest A. Tolin, Judge Presiding. [Rep. Tr. 3.] Government counsel made an opening statement [Rep. Tr. 3-8] and, upon its conclusion, appellant moved to dismiss the indictment. [Rep. Tr. 8, 9.] The motion was denied and appellant then moved for an acquittal on the basis of the government's opening statement. This motion was also denied by the Court. [Rep. Tr. 9, 10.] The government then called its first witness.

The direct testimony of William R. Farrington, a federal narcotic agent, was interrupted by examination of the government's second witness, chemist George B. Crane. [Rep. Tr. 38-71.] On Friday, March 29, 1957, the direct examination of William R. Farrington was continued. [Rep. Tr. 74-98.] Cross-examination was undertaken by defense counsel and finished on the same day. [Rep. Tr. 98-157.] The next government witness was Malcolm P. Richards, also an agent of the Federal Bureau of Narcotics. His testimony was finished on March 29, 1957. [Rep. Tr. 158-181.] Bernard G. Corbitt, likewise a federal narcotics agent, then took the stand for the government and his examination was terminated on said date.

[Rep. Tr. 181-193]. The next government witness was Algy Landry, a Deputy Sheriff of Los Angeles County assigned to the Narcotic Detail. [Rep. Tr. 193-200.] Dorothy A. Smith, also a Deputy Sheriff on said Narcotic Detail, took the stand for the government and testified on the same date. [Rep. Tr. 201-206.] The government rested its case on March 29, 1957. [Rep. Tr. 207.]

The case was adjourned to Tuesday, April 2, 1957. On that date appellant moved for a judgment of acquittal. The motion was denied. [Rep. Tr. 214-227.] The trial was continued to April 9, 1957 when appellant's case and government's rebuttal were presented. Appellant John E. Bradford took the stand. [Rep. Tr. 254-320.] Edward A. Carusi, a graduate student at UCLA, majoring in physiology and a research assistant there, also testified for appellant. [Rep. Tr. 321-341.] His other three witnesses, Wendell J. Snyder, Kenneth E. Irving and Fred George Fimbres, local law enforcement officers, then testified. [Rep. Tr. 350-358.] The government thereafter called its rebuttal witness Howard Chappel, agent in charge of the Federal Bureau of Narcotics of Los Angeles. [Rep. Tr. 359-372.]

Opening argument by the government was made. [Rep. Tr. 376-388.] Argument was made on behalf of appellant [Rep. Tr. 388-405] and the government's closing argument was concluded. [Rep. Tr. 406-412.] An objection to argument of the government was made by defense counsel but overruled by the Court. Also appellant renewed his motion for judgment of acquittal which was denied. [Rep. Tr. 414.]

On Wednesday, April 10, 1957, the jury was instructed by Judge Tolin. Exceptions to the charge to the jury were taken by the Court immediately thereafter and further instructions given. [Rep. Tr. 419-439.] The verdict in the case was received by the Court from the jury

on April 10, 1957. [Rep. Tr. 441.] On April 24, 1957, appellant argued a written motion for new trial and a written motion for judgment of acquittal. [Rep. Tr. 464.] Both motions were denied by the Court after extensive argument was heard. [Rep. Tr. 466.] On the same day, April 26, 1957, the Court, after reviewing appellant's record, sentenced him.

IV.

Statement of the Facts.

Since a statement of facts in Appellant's Opening Brief is set forth in considerable detail and covers approximately 35 pages in length, the government feels that a fairly short narrative of the facts, stressing the various matters which are particularly involved in the questions raised by appellant, would be helpful to the Court.

The first important transaction in connection with the sale of narcotics to Agent Farrington took place on August 28, 1956. However, the agent testified that he had spoken to appellant on the 27th of August, 1956 [Rep. Tr. 100] and told the latter that he, the agent, wished to do some business with him. Appellant replied that he didn't wish to talk on the telephone and would call and meet the agent the next day. Farrington testified that he had gotten appellant's telephone number from one "Bobby Hawkins". [Rep. Tr. 116.]

Appellant testified that he met the agent as "Ben Allen" at Bobby Hawkins' apartment about the 26th of August [Rep. Tr. 256] and his testimony showed, in effect, that the conversation which he claims took place there between all of the parties was no more than an introduction. [Rep. Tr. 257, 258.] This introduction was made by Mrs. Hawkins. In relating the conversation, appellant stated he asked her if he could buy two caps of heroin from her and was the "gentlemen here an all right fellow" (referring to

"Ben Allen"). All Mrs. Hawkins did was to reply in the affirmative, that the agent was a friend of her husband. [Rep. Tr. 256.] The only other conversation about narcotics was that Barbara Hawkins' husband, Doc Hawkins, was in jail and that "he" was trying to buy some heroin from her at that time, that "they were out" and that she didn't have any. The rest of the conversation was just "general", an "introduction". [Rep. Tr. 257.]

Agent Farrington testified that appellant did not call him back on the morning of the 28th of August and that he, the agent, called appellant at approximately 11:00 A.M. of that day. A man who identified himself as "John" came to the telephone and stated he had lost the agent's number, was glad that the agent had called him. Agent Farrington again told "John" that he wanted to do some business with him, without mentioning the word narcotics. [Rep. Tr. 118, 119.] At about 1:30 of the same day appellant and agent Farrington met in front of the B & M Cafe. [Rep. Tr. 119, 120, 259.] The appellant walked over to the agent's car and asked the latter if his name was "Ben."

Agent Farrington testified that just prior to going into the cafe appellant walked across the street to the car, leaned in and asked him if he was "Ben", then appellant got into the agent's car where they both had a conversation. [Rep. Tr. 18.] This was corroborated by agent Richard's testimony [Rep. Tr. 160], and also agent Dorothy Smith's. [Rep. Tr. 203.] The two men then went into the cafe where they stayed for about five or ten minutes. Agent Farrington testified that before they got into the cafe, appellant stated he didn't do any business in the Los Angeles area as there were two policemen who would love to apprehend him, naming them, and who worked out of the University Division. The appellant said it was too "hot" in Los Angeles and most of his transactions

were in San Francisco and Northern California. [Rep. Tr. 120.]

After the two men went into the cafe they had a further conversation regarding narcotics. The agent testified appellant told him the narcotics he had were of a very high quality and that he was sure the agent would be satisfied with them. Appellant further stated that he guaranteed the quality of the narcotics and the agent should not tamper with them too much; in other words, he should not "cut" them and weaken the orignal substance. [Rep. Tr. 18, 122.] The appellant further remarked that he didn't "tamper too much" with his narcotics, maintaining a "norm or level" and that his customers were happy with what they received from him since it was always consistent. [Rep. Tr. 123.]

Price was discussed at this meeting, appellant asking the agent how much the latter had paid in the past. Farrington told him that he had paid $300.00 an ounce. The appellant then said he could beat that price, would let the agent have an ounce for $275.00. During this time they were specifically discussing heroin. [Rep. Tr. 18, 19.]

Agent Farrington and appellant left the cafe after this conversation took place and got into the government vehicle which was parked outside. [Rep. Tr. 20, 128, 160, 204.] At that time agent Farrington gave the appellant $275.00 of official advance funds. [Rep. Tr. 20, 261, 303.]

Agent Farrington testified that he gave appellant the telephone number of an undercover apartment just after they left the cafe. [Rep. Tr. 20.] Agent Farrington then proceeded back to this apartment to wait for appellant's phone call. [Rep. Tr. 21.]

About 2:30 the same day Agent Farrington received a telephone call from appellant and got instructions from

the latter to go to 29th and St. Andrews. Appellant said he was waiting at that location. He further told the agent that he, the appellant, would have to do something he did not intend to do. He said, "I will have to go to your hand with the stuff." Agent Farrington testified that a "hand to hand deal" is referred to in the narcotics trade as from one hand to another person. The agent testified that he understood from his experience in his job that the defendant meant the latter would deliver the narcotics to the agent personally. [Rep. Tr. 21, 22.]

Agent Farrington left the apartment and met appellant at 29th and St. Andrews where the latter was standing near the fender of his own vehicle. The agent parked directly behind the appellant's automobile. The latter walked to the passenger side of the agent's vehicle, leaned in and stated that the "stuff" was under his rear tire, to the rear of the right rear door, in a brown paper sack. [Rep. Tr. 131.] He instructed the agent to pick it up when he, the appellant, left. Appellant then walked away from the agent's car but returned to the vehicle where he had leaned in. He wiped if off with his sleeve, went back to his own vehicle and drove away. [Rep. Tr. 22, 23.]

When the appellant testified, he appeared to indicate that both packages of heroin had been dropped at the base of a tree. [Rep. Tr. 263, 275.] However, he did not deny in his testimony the agent's testimony as to the above events at the corner of 29th and St. Andrews wherein the agent parked directly behind the appellant's vehicle and found the narcotics at the rear of the car as indicated above.

Agent Farrington then returned directly to the undercover apartment, met his fellow officers and the heroin was marked for indentification with their personal initials. This particular package purchased on the 28th of August

was made part of the Government's Exhibit No. 1 in evidence. [Rep. Tr. 29.]

Agent Farrington testified in his own opinion the price of $275.00 for an ounce of heroin was a "fairly low price", since the normal "market price" of an ounce might run from $300.00 to $500.00. [Rep. Tr. 133.] Appellant testified that he had some dealings with a "Pat" in connection with obtaining heroin for "Ben". [Rep. Tr. 260-262.]

Although the appellant had previously stated he had been addicted to heroin for two or three years prior to the first transaction with the agent [Rep. Tr. 257-260], he testified that he told "Ben" that he did not know anybody who sold big quantities of heroin. [Rep. Tr. 260.] He further testified that the agent was the one who asked him if he knew a fellow named "Pat". Although he testified to the above effect, he did admit knowing a fellow named "Pat" after being asked by the agent [Rep. Tr. 260] and was able that day to make a deal, according to his claim, with "Pat" for $270.00 worth of heroin, to wit, one ounce.

However, there was no evidence to show that anyone named "Pat" appeared on the scene in the first transaction or in the one which followed.

Agent Farrington called appellant on the 31st of August, 1956 and told the latter that he was interested in making another purchase of narcotics. Farrington said that on this telephone conversation appellant told the agent that he, appellant, had been waiting to hear from him and had wondered where the agent had been. Appellant stated that it would be all right to have another transaction with the agent and that he would meet him at the same place, 29th and St. Andrews in Los Angeles. [Rep. Tr. 31, 134.] Farrington also testified that at the time of the

telephone conversation, appellant asked Farrington how much he wanted, and the latter stated he would like as much as the last time. [Rep. Tr. 135.] On the 31st, before the agent met appellant again at 29th and St. Andrews, the former was advised by appellant that he hadn't been able to reach his "drop man" (the man who normally in the course of dealing in the narcotics traffic places the heroin at a certain location) since that man was playing golf. Later, at approxiamtely 2:00 P.M., appellant called Agent Farrington and said that he had gotten in touch with his "man" and the meeting was set for the 29th and St. Andrews. [Rep. Tr. 32, 141.]

Appellant related how he discussed with "Ben Allen" this other purchase of heroin on the 31st of August, a few days after the first deal had been consummated. [Rep. Tr. 265.] He said that, in effect, he had complained to the agent because the latter had not given him anything for undertaking the first sale. However he agreed to do it again. [Rep. Tr. 266, 273.] Appellant testified that after talking to "Pat" on the telephone he then called "Ben" and met him over on St. Andrews again. [Rep. Tr. 267.] The two men met on the corner at that locality about 2:45 P.M., and agent Farrington gave the appellant $275.00. The appellant told him to go to the apartment and the agent would be called by him later. The appellant did not give agent Farrington any narcotics at that time. [Rep. Tr. 33, 142, 306.]

Approximately 15 or 20 minutes later, appellant called agent Farrington and made arrangements to meet him at Washington and Westmoreland. The agent did see him at that place where he saw the appellant standing at a fire plug. There appellant entered the government's vehicle and told the agent to proceed down Westmoreland. They went to number 1741 of that street, which was the address of a large house. Appellant then pointed to a

small brown package which was at the base of a palm tree in the front yard and told the agent that the heroin was in that bag. [Rep. Tr. 34, 35, 143.] Although appellant in his testimony claims that the two of them went looking for the package together [Rep. Tr. 274, 275], the agent's testimony was that the two men proceeded to 1741 Westmoreland at the appellant's directions. [Rep. Tr. 143, 144.]

After appellant left agent Farrington's vehicle and entered his own, the agent having returned him to the spot where appellant's car had been parked previously, the agent proceeded back to 1741 Westmoreland where he waited until he was joined by agents Corbett and Richards. At that time he went over to the palm tree and got the package described by appellant. [Rep. Tr. 144, 164, 165.]

As appellant was leaving agent Farrington, after pointing out the brown package underneath the Palm tree on Westmoreland, the agent told him that he wished to purchase some "coke" (cocaine). [Rep. Tr. 307, 275, 276, 31.]

The heroin which was taken from the base of the Palm tree was part of Government's Exhibit 2. [Rep. Tr. 78.]

Since appellant was in a hurry when he was asked by agent Farrington about the "coke", appellant asked the agent to call him that night when the former got off work. The agent did call appellant later and asked him if he could procure one ounce of cocaine. [Rep. Tr. 276, 84.] This call was made on the 6th of September. The agent testified he had not called appellant during the period from August 31st to September 6th, but said he did call two or three times on that particular day after first contacting him. [Rep. Tr. 145.] Agent Farrington also testified that the appellant told him that cocaine would cost more money, probably $400.00, and directed him to go to the area of 42nd and South Central Avenue for appellant to

get the money in advance of procuring the cocaine. Both he and the agent testified that they actually met on that corner and that the $400.00 was given to appellant by the agent. The understanding was, according to appellant's testimony [Rep. Tr. 277, 311], that appellant was to use $300.00 of the money to buy cocaine and keep $100.00 for himself.

Agent Farrington saw the appellant the next day on September 7th on the street at which time the agent asked for either his money or the narcotics. [Rep. Tr. 87, 88, 147.]

At the time agent Farrington saw appellant on September 7th, the latter told him that he did not wish to "burn" the agent. Agent Farrington testified that the word "burn" is a word commonly used by persons engaged in the narcotics traffic meaning to take a person's money and abscond with it without delivering any goods. [Rep. Tr. 88, 89.] However, as appellant put in his own testimony, he "took that money and run off with it." The agent never did get the money, with the exception of $50.00 [Rep. Tr. 92, 312, 313], or the cocaine which had been promised to him by the appellant.

The agent made several vain attempts to get his money back or to get cocaine for his payment. On one such occasion agent Farrington and another agent saw the appellant in the bar of a hotel in Los Angeles. Appellant went to his room in the same hotel, according to what he told Farrington, and brought back an address, stating that the "junk", the one ounce of heroin, was in the gutter at a certain address which was written on a piece of paper. Agents Farrington and Richards proceeded to that address but, on arrival, found that there was no such place.

Edward A. Carusi testified for the defendant as a "graduate student at UCLA in the department of zoology,

majoring in physiology" and a "research assistant" at UCLA in the field of chemistry. [Rep. Tr. 321.] He stated that morphine could be synthesized and that it had been synthesized once in 1952 at the University of Rochester, as recorded in the Journal of the American Medical Society, 1952. [Rep. Tr. 323.] After discussing the synthesization of morphine and heroin, the witness testified on cross-examination that he had never looked at exhibits 1-d and 2-d, which comprised the heroin involved in this case, and that he had never made any chemical tests on the substances. Further, he was not requested to make any by the appellant and he had not been working with morphine, opium or heroin. [Rep. Tr. 331.] Carusi had not performed any experiments that he had discussed in his direct testimony and had never synthesized morphine. He did not know of any such process as he had described being conducted in the United States. [Rep. Tr. 332.] He did not testify that any synthesization of morphine had been conducted other than the one instance at the University of Rochester.

He testified that in the one instance of synthesization of morphine he mentioned, they had started with a very complex material which he had never used or seen himself and which had never been evolved or made in a laboratory where he worked. [Rep. Tr. 334, 335.] He stated that some heroin is made in laboratories, probably in very small amounts. The channels into which morphine is directed in its commercial sale were principally what might be called medical channels for the use of physicians, dentists and veterinarians, probably going from the pharmeceutical houses to such licenced persons. He knew of no legal medicinal use for heroin, except possibly for laboratory work. [Rep. Tr. 336.] The witness knew of no laboratory in the United States which prepared heroin for the use of an opiate, as a narcotic. He was not sure how the various ingredients found in opium are extracted from

it in this country, whether or not government laboratories handled the extraction or whether it was allocated to commercial pharmaceutical houses under some sort of supervision. He stated that as far as he knew the substantial bulk of opium which is used in this country to obtain morphine for medicinal purposes is shipped into the United States. [Rep. Tr. 338, 339.]

The Government entered into a stipulation with defense counsel with respect to certain products made in the United States from lawfully imported raw opium during the years 1954, 1955 and 1956. [Rep. Tr. 348, 349.]

The appellant also called as witnesses Wendell J. Snyder, Kenneth Irving and Fred George Fimbres, all Los Angeles law enforcement officers, in connection with the subject of alleged thefts of narcotics in this vicinity. Mr. Snyder was a policeman, Commander of the Planning and Research Division of the Los Angeles City Police Department with the rank of captain. He testified that there were "some" thefts of narcotic drugs, presumably speaking only for the city of Los Angeles, but that he did not know how many. His records were not geared to give the information which was requested in this respect by defense counsel. Mr. Irving was a captain in the Los Angeles County Sheriff's Department in charge of the Sheriff's Narcotic Detail. He testified that although, during the year 1956 as head of said department he did receive reports of any thefts of narcotic drugs in the unincorporated portion of Los Angeles County, his detail did not compile any statistics reflecting the amount of any drugs that were the subject of thefts in that area during 1954, 1955 or 1956. On cross-examination he testified that any of the thefts which had been called to his attention were usually in very small amounts. Mr. Fimbres was a Deputy Sheriff for the County of Los Angeles, Chief of the Administrative Division. However, he testi-

fied that his records did not indicate whether or not thefts reported during the years 1954, 1955 or 1956 involved the taking of narcotic drugs. [Rep. Tr. 350-359.]

In rebuttal, the Government called Howard W. Chappel, agent-in-charge of the Federal Bureau of Narcotics in Los Angeles. He testified that he had charge of the control of both illicit and licit narcotic traffic, including enforcement activity and registrant control, for an area which covered approximately one-half of California, a distance between San Francisco down to the Mexican border. He stated that his office handled the "Mexican border, Nevada, in some instances works over into Arizona and New Mexico." [Rep. Tr. 360.] He further testified that his office has liaison and close contact with all of the other government narcotic agencies in the United States and works in the control of the importation of narcotic drugs. [Rep. Tr. 361.]

In describing the importation and production of crude opium throughout the world, Mr. Chappel testified that opium is brought into the United States under bond on a quota, the latter having been arrived at by the United Nations. The production of crude opium throughout the world is more or less put into a common pool and the need for narcotics by individual countries, by which a *pro rata* share would be deducted, was computed by the United Nations. He testified that the United States does not give all its trade to any one country but buys a certain amount from each nation where opium is produced legitimately under licence, including Yugoslavia, Greece and Turkey. [Rep. Tr. 361.]

Mr. Chappel went on to say that the opium for the "world marget" (including the United States) is grown primarily through the Middle East, outside of the United States. The opium brought into the United States is done so under bond and kept under bond until distributed

to the manufacturers, In connection with its distribution in this country, manufacturers are given their quota and they purchase on specific forms furnished by the government for that purpose. He stated that it is known how much of a certain by-product like codeine or morphine can be made from a given quantity of opium. The opium is closely controlled and the Bureau of Narcotics determines that no company will manufacture or use more opium than is actually needed for the production of morphine or codeine or whatever product is desired. He added that the opium is shipped in this country under very severe guard to the various manufacturers and "there is no chance for them to divert, get a quantity of opium and make so much morphine for the legitimate market and then divert some to the illegitimate market." There is a control on the figures of the quantities of opium alloted to each individual company kept by the Bureau. [Rep. Tr. 363.]

With respect to heroin, Mr. Chappel stated that it is a "contraband". [Rep. Tr. 364.] In regard to the distribution of morphine, when it is manufactured in this country from opium, it is then sold to distributors or retailers on a triplicate order form. The retailer purchases a book which has three sheets with carbons in them called Triplicate Order Forms, each one being numbered. The purchaser keeps one copy of the Order Form and two copies go to the manufacturer or the seller. The latter keeps one copy for his files, as a receipt for the narcotics which he has sold. He then sends the third copy to the Bureau of Narcotics where it is maintained. He further stated that everyone who handles the narcotics from their crude opium form "right down to the doctor or physician who dispenses it", had to be registered and pay a tax. [Rep. Tr. 365.]

The witness testified that during the course of his duties he has attempted to locate any illegal processing points or laboratories which might be extracting heroin from morphine without proper authorization from the government. He stated that he had never found anything which could be called a "clandestine laboratory" in the United States. His answer was inclusive of the nine and one-half years that he had been in the Bureau.

Chappel went on to say that to the best of his knowledge certain agencies, like the United Nations chemist, had been authorized to make certain experiments like synthesizing heroin. Such heroin has been furnished by the Bureau of Narcotics under "special dispensation" and under government control. Such heroin furnished for experimental purposes would be from Lebanon, Turkey, France, some from the United States and some from Mexico. He further stated that there were three or four countries in Europe within the United Nations group who have not outlawed heroin as yet. [Rep. Tr. 366, 368.]

By law all registrants are required to report to the Federal Bureau of Narcotics, Mr. Chappel continued, the loss or destruction or theft of narcotics by affidavit. For instance, if a drug addict would break into a drug house and steal 25 tablets of quartergrain morphine the druggist would be required by law to submit that theft to the Federal Bureau of Narcotics through an affidavit. Although he testified that the local records kept in his office would not be adequate to advise him as to the exact amount of any thefts for any given period of time, particularly the first half of the calender year of 1957 during which the case was being tried, he stated that the quantity of such losses has been small. [Rep. Tr. 370-372.]

V.
ARGUMENT.

1. The Issues.

As a preliminary statement the Government feels that it would be helpful to clarify the issues involved in the trial of this case.

It is obvious that the primary elements of the offense as charged in each count of the indictment are the sale, the unlawful importation, and the knowledge of the defendant that the heroin was unlawfully imported. The Government's theory on trial was to prove the sales by evidence of specific facts involved in each transaction and to prove the unlawful importation of the heroin and the knowledge of appellant of such unlawful importation by use of the presumption in Section 174 of Title 21, U. S. C. which, in effect, authorizes a conviction upon proof of defendant's knowing possession of the drug. [Rep. Tr. 4. 5, 383, 384.]

The defense was directed to the assertion of the unconstitutionality of Section 174, and this contention in its various ramifications was presented to the trial court on motions made during the course of the proceedings. Evidence was presented by the appellant on the question of unconstitutionality and also on rebutting the presumption in the statute by showing that the heroin could possibly have been manufactured from "lawfully imported crude opium within the confines of the United States." [Rep. Tr. 460] or that it was derived from synthesis in this country. Appellant then "disputed the transaction" [Rep. Tr. 464], endeavoring to prove, with respect to the sales, that there had been an entrapment and, at any event, that the appellant had not had possession of the two quantities of heroin involved.

As the case progressed the Government did offer evidence to prove the two sales and knowing possession in

the appellant, and then relied upon the presumption with respect to unlawful importation and knowledge thereof. After the appellant's evidence was presented and final argument made, it was clear that the only real issues before the jury were: was there a lawful sale or an unlawful entrapment and was the heroin unlawfully imported into the United States. This last issue turned on the question of whether or not the defendant had the "possession" required by the statute. This was also in dispute. In addition to the foregoing there was, as stated above, the legal question of the constitutionality of the statute. [Rep. Tr. 249, 251, 382-384, 394-396, 464.]

The sale or entrapment question are no longer before the Court, the jury having found against the defendant on these issues under proper instructions.

2. The Statute Is Constitutional.

Almost all of the matters raised by appellant with respect to the alleged unconstitutionality of Section 174 of Title 21, U. S. C. are considered in this one Section.

It is clear that the provisions of the statute which relate to the regulation of unlawfully imported narcotics, with the provision of the knowledge of such importation by a defendant, are not an invasion of state police power, even though the particular drug becomes integrated with interstate property.

Steinfeldt v. United States, 219 F. 2d 879 (9 Cir., 1951);

Sheppard v. United States, 236 Fed. 73 (9 Cir., 1915).

It appears that appellant's contentions with respect to the constitutionality of Section 174 have been almost exclusively directed to the so-called presumption contained in the Section. However, before discussing the presumption, appellant's contention that the act is unconstitutional

in that it allegedly invalidly attempts to control synthesized narcotics will be discussed.

The words "narcotic drugs" as used in Section 174 have been construed to mean by Section 3228 (g) of Title 26, U. S. C. as including the substances listed in the act which have been produced "independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:".

Appellant has proposed no logical reason for his statement that a prohibited drug produced independently by means of "chemical synthesis" has nothing to do with foreign commerce. He attempts to discuss "paverine" at page 45 in his brief, calling it "the chief synthetic narcotic" and coments with respect to its manufacture in the United States during 1955. However, there is absolutely no evidence before the Court and nothing from which the Court can take judicial notice to show that such a drug exists, that it is a synthetic narcotic, that it was manufactured in the United States at all or that it has any connection with heroin.

At any event, it is clear that every possible presumption in favor of the validity of an act of congress should be made until overcome beyond any rational doubt.

Fisch v. General Motors Corp., 169 F. 2d 266 (6 Cir., 1948);

United States v. Smith, 62 Fed. Supp. 594 (D. C. W. D. Mich., 1945).

It is equally certain that the party attacking the constitutionality of the statute has the burden of showing that there could be no reasonable basis for the legislation.

Foley Securities Corp. v. Commissioner of Internal Revenue, 106 F. 2d 731 (8 Cir., 1939);

Fisch v. General Motors Corp., supra;

United States v. Bryan, 72 Fed. Supp. 58 (Dist. of Col.).

First, judicial notice will be taken of the fact that heroin is a derivative of morphine, and morphine is in turn a derivative of opium, and all are narcotic drugs within the meaning of the law. At the time of the recent amendment in July, 1956 to the various laws relating to narcotic drugs, a report was made to the Congress, which is contained in United States Code, 1956 Congressional and Administrative News, Volume 2. This report shows, at page 3298, that illicit narcotic drugs continue to flow into our port cities and across our borders from communist China, Turkey, Lebanon, and Mexico, and that the source of supply for illicit traffic is from foreign countries. The sub-committee believed that additional personnel stationed in foreign countries would be as effective a step in combating such traffic in the United States as any other one step that should be taken. Thus, it is obvious that the supply for the traffic, and heroin in particular, comes almost wholly from foreign, not domestic sources. It depends almost entitrely on being supplied through smuggling of narcotic drugs from abroad.

Thus, although the report stressed community responsibility for stemming the increase of addiction and the sale of narcotics, the international controls were stated to be the most effective means of eliminating this evil (pp. 3301, 3305-3308, 3311).

In connection with any contention that congress cannot validly control the unlawful importation of synthetic drugs, it is also of interest that at page 3308 the report indicates that the 1948 Protocol providing for international control of "new, dangerous synthetic drugs" throughout the world saved the United States from a *flood* of these drugs from Eureopean factories. There it was shown that these synthetic drugs had been manufactured to a considerable extent in Europe and that, although not a flood, there could well be much more than

a trickle of these drugs being smuggled in from factories abroad.

At page 3311 of the report we note that in speaking of barbiturates and amphetamines, it was said that large quantities had been diverted from interstate shipments to illicit channels. No such statement was made with respect to narcotic drugs such as opium and its derivatives, or as to synthetic drugs.

In connection with the question of the statute being constitutional on its face, it is to be noted that at page 3291 of the report, the sub-committee conducted fifteen days of hearings before making a finding with respect to the fact that the illegal traffic of narcotic drugs in the United States is supplied by the smuggling of such drugs from abroad. Thus, it appears that through the committee's report we find the reason for the regulations being in force is still, as it was at the time of the enactment of the statute, that the drug traffic in this country is supplied almost entirely through foreign sources.

It is settled that where a statute is assailed as unconstitutional, the Court must assume the existence of any stated fact which would sustain the statute in whole or in part:

Alabama, etc. v. McAdory, 325 U. S. 450;
Foley Securities Corp. v. Commissioner of Internal Revenue, supra.

This Court's attention is respectfully called also to its recent decision of March 26, 1958 in the case of *Ambrose Badillo Caudillo, Joe Romero v. United States of America,* No. 15,734, which was an appeal from the United States District Court for Southern District of California, Central Division. The opinion, written by the Honorable Circuit Judge Barnes, shows that *Caudillo* appealed from three counts (two of sale and one of possession) and Romero was appealing from his conviction on two counts

(both of possession) which counts charged violation of Title 21, U. S. C., Section 176 (a). That Section, of course, relates to the receiving, concealment, buying, selling, etc., of marijuana which had been imported into the United States contrary to law and contained similar provisions, including the presumption, as are contained in Section 174. Judge Barnes said, among other things,

> "* * * If any constitutional safeguards are violated by section 176-(a) the Supreme Court will strike the statute down by reversing or distinguishing its previous pronouncement. The public interest in the proper control of narcotics traffic requires an intermediate court to proceed with caution. * * *"

The testimony of the defendant's own witness here, Edward A. Carusi, and the government's rebuttal witness, Howard Chappel, corroborated the information set forth in the above cited report and gives "stated facts" which sustain the statute. Both Carusi and the government chemist testified that morphine had been synthesized once about 1952 at the University of Rochester. However, Carusi had not performed any experiments that he had discussed in his direct testimony with respect to synthesization and did not know of any process such as he had described as having been conducted in the United States. He did not testify that synthesization of morphine or heroin had been conducted other than the one instance at the University of Rochester. Further, the witness testified that in the one instance of synthesization which he mentioned, they had started with a very complex material which he had never used or seen himself and which had never been involved or made in a laboratory where he had worked. Furthermore he knew of no laboratory in the United States which prepared heroin for the use of an opiate, as a narcotic.

Howard W. Chappel, agent-in-charge of the Federal Bureau of Narcotics in Los Angeles testified that, among

other things, during the course of his duties for approximately nine and one-half years he has attempted to locate any illegal processing points or laboratories which might be extracting heroin without proper authorization from the government. However, he had never found anything which could be called a "clandestine laboratory" in the United States. He went on to say that to the best of his knowledge certain agencies like the United Nations chemist had been authorized to make certain experiments like synthesizing heroin, but that otherwise heroin was "contraband."

Thus, this testimony fully corroborates the fact that synthetic heroin found in the United States, if there is any in this country, would have been smuggled in from foreign sources.

Counsel for appellant in his opening brief has made several elaborate and completely unwarranted statements with respect to synthetic drugs. Contrary to all the evidence in this case and the evidence produced before Congress at the time of the amendment as contained in the above report, he claims at page 44 that a prohibited drug "produced independently by means of 'chemical synthesis' certainly has nothing to do with foreign commerce." At page 47 he says that "since this court can take judicial notice of the fact that *all* synthetic narcotics are domestically produced, it must agree with the appellant that Congress cannot control them under the illogical guise of foreign commerce". That statement likewise runs contrary to all of the weight of the evidence and inferences which this Court can make therefrom. At page 54 the same illogical thought is pursued when he says with respect to synthetic drugs "because no such smuggling occurs". Counsel does not refer to any evidence or circumstances in any way from which he comes to such a conclusion except, at page 40 of his brief where certain comments are made with respect to a bulletin called

"Traffic in Opium" an "eye-opener in this respect". As we have stated above this bulletin is not contained in the United States Code and has not been introduced in evidence in the within case and therefore is not before this Court for consideration. Counsel then goes on to attempt to discuss the alleged report drawing such conclusions as heroin could be made from any of the synthetic narcotics mentioned if they are first returned to morphine. However his own witness did not come to such a conclusion in testifying with respect to synthetic narcotics.

At page 41 of his brief counsel for appellant makes an unwarranted statement with respect to certain figures relating to seizures of opium and heroin, again which are not before this Honorable Court in the within appeal. He stated that "these respectively high and low numbers *might very well mean* that the seized drugs come from illicit diversions of lawfully imported or synthesized narcotics instead of being traceable to criminal import." (Emphasis ours.) This again is typical of the unfounded statements contained in the brief in respect to the synthesization of narcotics which are the result of sheer speculation.

"There is no evil to correct" then says the appellant. Certainly he is at swords point with the sub-committee in its report to the Congress, and with the testimony given by his own witness, Carusi. The only information to support the appellant's statement is contained in the above paragraph, that certain numbers "might very well mean". That claim is repeated again in the next paragraph as an absolute statement of fact. In other words, his speculation was turned into doctrine by the simple process of repetition.

It is believed that it has been amply demonstrated that Section 174 is constitutional in its control of unlawfully imported synthetic drugs.

It is further submitted that the presumption in the statute authorizing a conviction upon proof of possession unless satisfactorily explained to the jury is constitutional. In the above-mentioned *Caudillo* case recently decided by this Court of Appeals, both appellants urged that Section 176(a) was unconstitutional because there was no rational connection between the statutory presumption and the facts proved thereby. In *Caudillo* it was also urged as a second ground that any presumption was defeated as a matter of law by evidence received in rebuttal in the case.

The Court remarked at the beginning of the decision that Section 174 is an almost identical provision to Section 176(a) and that also there was a similar provision in Section 181, creating the same presumption with respect to opium prepared for smoking. The Court then went on to say the Supreme Court in the case of *Yee Hem v. United States,* 268 U. S. 178 and this Court in the cases of *Hooper v. United States,* 16 F. 2d 868 and *Rosenberg v. United States,* 13 F. 2d 369 had held the presumption not unconstitutional and "this statute has laid down a rule, not of substantive law, but of evidence." The case of *Gonzales v. United States,* 162 F. 2d 870, also a decision from this Circuit was cited to the effect that requirement of proof "to the satisfaction of the jury" is not unconstitutional.

The Court stated that:

> "The essence of appellants' joint claim of unconstitutionality is that marihuana, unlike opium, can be, and is grown in California and other southwestern states of the United States, and hence it cannot rationally be inferred from mere possession that that particular marihuana was knowingly illegally imported."

The Court stated that no direct evidence was produced as to whether the marihuana was grown within or without

the United States but there was testimony indicating the marihuana was "unmanicured," in other words it had seeds and stems and sticks mixed with the leaves. That indicated the marihuana was at least partly made up from the flowering top of a plant and not solely from the leaves. The plant flowers at maturity and very few mature marihuana plants are found growing in California. The appellant's own witness had testified that he only knew of one seizure of a mature plant with a flowering top in his memory. It was also testified that in the manicured state one could not tell the difference between marihuana grown in the United States and that grown outside it.

It should be noted in passing, in connection with a discussion of instructions, *infra,* that in the within matter there was also no direct evidence offered by the appellant to show that the specific heroin in question had been derived from other than an unlawfully imported narcotic. Circumstantial evidence only was offered in an attempt to show that there was a "chemical possibility" that the heroin could have been synthesized in this country or that there was a possibility that the heroin could have been derived from lawfully imported opium. The evidence showed that such *possibilities* were negligible.

The Court stated that in the *Caudillo* case there existed a factual situation from which the jury could draw the inference that it was extremely unlikely that parts of flowering tops would be found in marihuana grown in the State of California. The jury had been instructed in that respect that they could, but were not compelled to, draw an inference the marihuana was imported contrary to law and that the defendant knew it. It was also explained that there was a possible contrary inference that the marihuana was not imported contrary to law from the whole evidence, including the evidence that marihuana grows in the United States and California and the evidence relating to its growth.

It seems apparent there that the judge was instructing the jury on the one real issue arising from the presumption, as was done herein by Judge Tolin, that is, whether or not the marihuana was unlawfully imported.

If it could be said that there also existed a factual situation in the within case from which the jury could draw any inference with respect to the source of the heroin, then it appears that it would be that it was extremely unlikely that the heroin involved would have been derived from a source within the limits of the United States of America. Since that appeared to be part of the defense raised by appellant below, then the jury did draw such an inference by its verdict of guilty.

At any event, in the *Caudillo* opinion the Court stated that the appellants had correctly argued that the second paragraph of Section 176(a) "creates a presumption which if followed supplies two elements of the crime charged: (1) illegal importation of the marihuana and (2) knowledge by the defendant of the illegal character of the marihuana * * *".

The Court went on to say that both appellants there had relied heavily in their defense on constitutional grounds on *Tot v. United States,* 319 U. S. 462 (1943), (also cited on numerous occasions by appellant Bradford herein.) That was a case involving the Federal Firearms Act which made it unlawful for one convicted of a crime of violence or being a fugitive from justice to have any firearms or ammunition which had been transported in interstate commerce. In that statute "the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, in violation of this Act".

This Court stated that the appellant in the *Tot* case, as in the *Caudillo* matter, attacked the presumption created

by the statute on the ground that there was no rational connection between facts proved and the ultimate fact presumed, and that the statute cast an unfair and practically impossible burden on a defendant.

In commenting on the *Tot* case, the Court stated:

> "The difficulty with appellants' reliance on the Tot case is that it provides no precedent in this, a factually different case. The possession of a firearm or ammunition is ordinarily lawful. There exists the possibility of lawful possession of opium derivatives, or other narcotics, for they have definite therapeutic medical values and a scientific need exists for their possession by many doctors in almost every hospital in the United States. But this Court knows of no medical or scientific use to be made of marihuana, save perhaps for occasional testing in order to make scientific comparisons with other narcotics, barbiturates and amphetamines."

The Court went on to say that:

> "The statutory language in question has long existed in the narcotics laws. In *Yee Hem v. United States, supra,* the Supreme Court upheld the presumption in reference to opium. Appellants seek to distinguish the *Yee Hem* case on the ground that all opium is necessarily imported and therefore the presumption is reasonably accurate. However, the Court noted in that case that some opuim *is legally* imported, but that the possibility of a defendant having in his possession legally imported opium would be so rare as to permit the legislature to establish the presumption and thereby shift the burden of going forward with rebutting evidence. Ultimately the burden of proof beyond a reasonable doubt remains with the government and the presumption is merely an aid in sustaining that burden. If we agree that

by far the larger part of all marihuana found within the United States is imported then it is reasonable inference that it is probable that one in possession of marihuana is in possession of imported marihuana. And, a fortiori, it can be inferred that the person in possession knows of the illegal importation. '. . . The strength of any inference of one fact from proof of another depends upon the generality of experience upon which it is founded.' Though there might be differences of opinion, it can reasonably be argued that the facts of marihuana importation are so well known, particularly to marihuana users, that 'there is a rational connection between the fact proved and the ultimate fact presumed.' It might even be urged that the inference could be said to exist independent of the statutory authority therefore * * *".

At page 8 of the decision, the Court stated:

"Finally, the Supreme Court had held that merely because it might be *possible* to legally import opium into this country, the presumption created by the legislature that allows the jury to draw an inference of illegal possession and knowledge of that illegality was valid. We can envision the *possibility* of opium poppies growing in this country, yet that fact will not cause us to declare Section 174 unconstitutional. We believe the permissible inference the jury may draw as to the unexplained possession of marihuana is supported by facts more closely resembling the permissive inferences in the general narcotic trade than the conclusive presumption which was required to be drawn in the firearm statute. The former has been held constitutional, the latter not. If any constitutional safeguards are violated by Section 176(a), the Supreme Court will strike the statute down by

> reversing or distinguishing its previous pronouncement. The public interest in the proper control of the narcotic traffic requires an intermediate court to proceed with caution. This is particularly true under the facts of this case where a question for the jury was created by the expert testimony produced on behalf of both defendants."

The Court went on to discuss Caudillo's second point which was "the defeat of the presumption as a matter of law" and stated two failings which existed in it. The "better view" was adopted that "a *valid inference remained even after there is rebutting evidence, either of the fact upon which the inference is based or those sought to be proved by it.*" The Court then concluded by stating that the jury was entitled to consider the presumption and determine if, notwithstanding the rebutting evidence, the side relying on the inference had sustained its ultimate burden of proof. Since the jury had returned the verdict of guilty there the Court felt that it was clear that appellant had failed to convince them that the possession was other than illegal and further the inference permitted by the statute "was sufficient to convince the jury beyond a reasonable doubt that both appellants knew the marihuana in their possession had been illegally imported."

The judgment as to each defendant in the *Caudillo* case was then affirmed.

In the within case appellant appears to be contending that the case of *Gonzales v. United States,* a decision from this Court of Appeals has to be written directly into the so-called presumption in Section 174 as a definition of "satisfaction" in the last paragraph. Thus, he contends, Congress passed a law which regulates all heroin, regardless of the source, whether traceable to a lawful or unlawful import or derived from synthesis.

In connection with his discussion as to the lack of triviality in this argument he endeavors to discuss the bulletin "Traffic in Opium" which, again, is not before this Court for consideration. He seems to state that if it is impossible to show the legality of importation, or demonstrate the innocence of appellant's mind, or offer evidence to synthesization of narcotic drug in appreciable quantities with respect to any certain quantity of heroin which had been fully integrated in intrastate goods, then Congress was regulating a narcotics problem exclusively under the jurisdiction of the state.

It appears that this contention is primarily based upon a confusion of the language of the *Gonzales* case.

There is no possible showing of "lawful" possession with respect to heroin says the appellant, disregarding the possibility of showing a possession for certain limited purposes such as experimentation, and he goes on to state that this results in the regulation of all heroin, regardless of the source.

A careful reading of the language of the *Gonzales* case shows that Judge Stevens stated:

> "* * * the satisfaction of the jury as to the explanation turns upon whether or not the possession was *within the exception* provided in the statute." (Emphasis added.)

This language has a different meaning than the interpretation placed upon it by the appellant. It does not indicate in any respect that compliance with the Harrison Stamp Act is the only affirmative defense under Jones-Miller Act.

With respect to lawfully imported opium, or its derivatives, which might become, since the importation of the opium, illicitly diverted, or a synthetic drug manufactured in this country and also so diverted, it is to be noted that language of the *Gonzales* case allows an ex-

planation of possession "within the exceptions provided in the statute." Thus, it is not compliance with the Harrison Stamp Act which would offer the only defense to one indicted under Section 174, where the Government relies upon the presumption, since the lawful importation of opium, illicitly diverted after importation would be a defense under the language of *Gonzales*. This is one of the exceptions provided in the statute namely, Section 174. A similar defense appeared to have been raised in the *Caudillo* case, that is, that the marihuana could have come from domestically grown plants. With respect to heroin, agent Chappell's testimony showed that laboratories or persons connected with them are sometimes allowed to synthesize or possess heroin under special dispensation from the Government for experimental purposes in this country. Thus, it is obvious that a defense under a prosecution under Section 174 could be made on proof of lack of unlawful importation if the heroin had been derived from a quantity which had been synthesized in this country for experimental purposes.

The word "lawful" possession may have been used loosely in some of the cases but the exact criterion to be used is that set forth in the *Gonzales* case, that is whether or not the explanation shows a possession "within the exceptions provided in the statute." This was recognized by counsel and by Judge Tolin in the instructions in within case since he mentioned that not only could a defendant show possession for experimental purposes (although such a defense was not tendered here) but also that there would have been no case against him if he showed the heroin had been derived from narcotics which had been originally imported lawfully and diverted since that time.

As indicated above, one of the primary theories of defense below was an endeavor to rebut the presumption by proving by circumstantial evidence that the heroin

could have been derived from a drug synthesized in this country or from opium which had been lawfully imported and subsequently diverted. The defendant recognized that this was allowed under the statute since he tried to show the "chemical possibility" of the synthesization, together with the extent of lawful imports, followed by an unsuccessful attempt to show (but only in Los Angeles County) thefts of narcotic drugs from the licensed holders of these narcotics. Although the evidence actually proved the extremely strict control over lawful imports and the small quantity of any thefts from such persons or doctors or other licensed holders, the defendant still proceeded in this theory of a defense.

The jury was told by Judge Tolin that if they found that the heroin was manufactured in the United States "then there is no case against this defendant". As in the *Caudillo* case they were also told that the presumption that:

> "if heroin is found in the United States it is imported heroin is not conclusive. It is a presumption, that is, it is a circumstance which you are to consider as so, if it is proved that the heroin was here and in the possession of the defendant, but it is not necessarily conclusive that this be the case. This law suit is open to the insistence by the defendant that this was, in fact, domestic and not imported heroin." [Rep. Tr. 436.]

As far as we can ascertain, the word "lawful" was not used during the jury instructions. The expression was used by counsel [Rep. Tr. 464] in arguing a motion for a judgment of acquittal. At that time he stated that if possession was unlawful, then there was no reason why a defendant could not go forward and prove that he stole it, for example, from the Dow Chemical Laboratory after the narcotic lawfully entered the country. Judge Tolin replied that such was the case, but that appellant

did not do that. The Court then stated the theory of the defense, which has been developed through the statements, evidence, instructions and arguments, to the effect that appellant relied on showing a "chemical possibility", that is, that a person could take morphine and make heroin out of it in this country and, further, that appellant "disputed the transaction".

Congress thus does not regulate all heroin regardless of lawful or unlawful importation since there are affirmative defenses available under the "exceptions" in the statute by which it can be shown that the drug was either a synthetic heroin manufactured in this country or that the opium from which it was derived was lawfully imported. If a defendant experiences difficulty in this respect (probably since almost all heroin, natural or synthetic, does come from abroad) the constitutionality of the statute is not affected in that he would be given an opportunity to show the true source of the drug involved. This the defendant attempted to do and was allowed to do; it was one of the main theories of his defense. Assuming, *arguendo,* that the only defense which could be shown under the statute was one which cast "an unfair and practically impossible burden on a defendant," there is no evidence before this Court to show that there would be any more than infinitesimal quantity of narcotics thereby "controlled" as derived from lawfully imported narcotics or synthesized in this country.

As a matter of fact, this Court can indulge in the inference that almost all heroin does come over the borders of the United States by unlawful importation, considering the material contained in the sub-committee report, the evidence in the case as to the strict control of lawfully imported opium and the negligible amounts of morphine which have been synthesized, particularly agent Chappell's testimony as to the fact he has not found any "clandestine" laboratories manufacturing heroin in a substantial por-

tion of California for approximately ten years and that heroin is a contraband. However, should a rare situation occur where heroin which was not involved in an unlawful importation, a defendant still has his opportunity under the presumption in Section 174 in the *Gonzales* case to present his defense. Thus the presumption is entirely reasonable since there is a rational connection between the statutory presumption and the facts proved thereby.

See *Yee Hem v. United States,* 268 U. S. 178, *supra,*

There will be a further discussion on this subject on the possible limitations of rebutting the presumption in connection with the treatment of the Court's instructions hereafter.

Appellant also contends that there is an "authorization" in the last paragraph of Section 174, which contains the presumption to the jury to return a "conviction" of unlawful sale and that such an authorization is unwarranted. At page 48 of his brief he claims that possession has been held sufficient to prove a sale, "simply with the aid of the statutory presumption". At page 49 of the opening brief appellant then cites the *White, Stoppelli, Ng Sing* and *Pitta* cases in support of that contention. All of those cases were decisions of this circuit, except the *White* matter. He then goes on to state that some Courts of Appeal believe the presumption goes only to the unlawfulness of the importation and the defendant's knowledge thereof and cites certain cases in connection with that statement. Appellant then remarks that although the latter cases appear to be more reasonable and fair, it is a "tortious" interpretation of the statute, "for the statute expressly provides that possession authorizes *conviction,* not the inference of unlawful importation and knowledge. However, apparently this Court of Appeals has not agreed with that contention in any of its decisions, apparently not believing that a holding

the presumption goes only to the unlawfulness of the importation and the defendant's knowledge is not "tortious" as an interpretation of the statute.

Not only do the *White, Stoppelli, Ng Sing* and *Pitta* cases not support appellant's contention that the law in this Circuit holds possession is sufficient to prove a sale, but the above cited recent decision of this Court in *Ambrose Caudillo, Joe Romero v. United States, supra,* expressly states that the same language in Section 176(a) creates a presumption which if followed supplies two elements of the crime charged; "(1) Illegal importation of marihuana, and (2) Knowledge by the defendants of the illegal character of the marihuana * * *."

It certainly cannot be said that the holding of this circuit that the presumption applies to the elements of importation and knowledge thereof is unreasonable or arbitrary. It has been established in the United States Code that the hearings which preceded the enactment of the statute were substantially geared to the question of importation, the source of the drugs and the general reputation in the illicit traffic of narcotics of such facts. That an unlawful importation of heroin and knowledge thereof by a defendant selling the drug illicitly in this country are two elements of the crime which can most reasonably be said to be established by overwhelming evidence of the well known circumstances surrounding the flow and origin of unlawful narcotics can hardly be doubted. Those are the elements in a charge under Section 174 which normally cannot be proved specifically with relation to each quantity of heroin, but which are established as indicated above by overwhelming evidence of the facts surrounding the illegal traffic of narcotics. It is thus reasonable that the presumption should be geared only to those two elements and that the other elements of the crime involving the particular transaction should be the subject of specific proof in each case.

Not only is the law in this Circuit to the effect that the presumption only applies to the elements of unlawful importation and knowledge thereof, but the jury was fully instructed to the effect that the Government had to offer specific proof of a sale.

During the course of instruction counsel for appellant stated to the Court:

> "About the presumption, your Honor, it says that would justify a conviction. The presumption doesn't raise any inference there was an unlawful sale or facilitation of the sale."

In response to counsel's remarks the Court further instructed the jury:

> "In order for there to be a conviction in a case of this character it is necessary there be proof there actually was a sale. There is no presumption there was a sale. You look to the evidence to determine whether there was or was not a sale. The presumption comes into play only if the defendant is shown by the evidence to have had possession of the narcotic substance, if you find it to have been such."

Thus, during the trial, counsel's theory was that the presumption didn't raise an inference of unlawful sale, although now it appears to be that the statute expressly refers in its presumption to the element of sale as well as unlawful importation and knowledge thereof. Even if counsel could be said to be correct, which he is not, the statute could not be held to be unconstitutional as applied to this case since the jury was fully instructed that they had to find a sale before they could convict the defendant.

The presumption is attacked finally on the basis that it contains a "conclusive presumption of fact." This par-

ticular point has been fully discussed in the above cases and it will not be repeated to any great length again. Appellant merely repeats his contentions with respect to the *Gonzales* case, which as stated above, is based upon a confusion of the language of that case, and his unwarranted statements with respect to "established facts" as to the synthesization of narcotics and illicit diversion of lawfully imported narcotics. Appellant refers again to the *Tot* case, 319 U. S. 463, which, as stated above, this Court considered in the *Caudillo* matter. We point once more to the fact that the appellant in the latter case complained that the statute cast an unfair and practically impossible burden on the defendant. This Court stated, with respect to that contention, that the *Tot* case is a factually different matter. Judge Barnes went on to say that, in effect, there was a rational connection between the facts proven and in the ultimate fact presumed. Furthermore, as we have stated, the defendant does have his defenses under the *Gonzales* case, even though the possibility of proving possession of heroin from legally imported opium or some which had been synthesized in this country would be "rare." See *Yee Hem v. United States, supra; Copperwaite v. United States,* 37 F. 2d 846. Furthermore, it might be said to be a possible defense, as was presented in the within case, that the defendant could attempt to persuade a jury that the particular heroin involved was derived from such sources by circumstantial evidence as to a "chemical possibility" or that such heroin *could have been* derived from lawfully imported opium.

Thus, the presumption is not conclusive and conforms to the well-know facts of the source of heroin.

3. The Jury Instructions Were Adequate.

(a) The Trial Judge Did Not Err in Instructing the Jury That the Heroin Involved in the Case Could Be the Result of Chemical Synthesis.

This objection to the instructions has already, in effect, been explored by the above discussion of the synthesization as it effects the constitutionality of the Act. It is quite clear that the Act is not unconstitutional in that it also includes synthesized narcotics within the meaning of the words "narcotic drugs."

Counsel for appellant is still basing his conclusions upon unwarranted assumptions as to the circumstances surrounding the synthesization of narcotics. In talking about synthetic drugs, he states that "no such smuggling occurs" and therefore the law is arbitrary because it purports to correct no existing evil.

The Government has already shown that *if* there is any synthetic heroin involved in the illicit traffic of narcotic drugs in the United States, it would of necessity have come from a foreign source. The only conceivable source of such a drug from within the confines of this Country would be from a negligible amount, possibly synthesized in an experimental laboratory under strict control. Even so, the evidence only shows that this was a "chemical possibility" and there has been no direct evidence that heroin itself had been synthesized. The testimony of the witness Carusi and Agent Chappel showed that the likelihood of any lawfully imported opium being diverted and thereafter morphine being manufactured from the opium, followed by a manufacture of heroin from the morphine is so unlikely as to be practically nill. If there is any synthetic heroin being sold in the illegal traffic of narcotics, and it may well be that *all* of the heroin in such traffic has been derived from a natural source in a foreign country,

then such a synthetic drug would have had to have been unlawfully imported.

Counsel for appellant claims that the presumption is alone sustainable on the assumption that the source of morphine and morphine derivatives "are chiefly grown in foreign countries, not that they are synthesized there." However the fallacy with this statement is that the cases which have sustained the validity of the presumption happen to involve a natural substance such as opium or morphine manufactured from opium, and the possible synthesization of morphine or heroin was apparently not known in those days. The *Copperwaite* case, 37 F. 2d 846 was decided in 1930, the *Yee Hem* case, 268 U. S. 178 was decided in 1925, *Moe Liss,* 105 F. 2d 144 in 1939, *Gee Woe,* 250 Fed. 428 in 1918, etc.; it is not surprising that the synthesization of narcotics was not discussed in these cases. However, there is no reason whatsoever why the presumption is not sustainable on the inference drawn from the facts before Congress and the evidence in this case that the source of synthetic drugs is chiefly from foreign countries, just as the source of opium is from abroad.

In conclusion on this particular point, again the presumption has a "rational connection between the fact proved and the ultimate fact presumed."

(b) The Trial Judge Did Not Err in Instructing the Jury With Respect to Knowledge of Unlawful Importation.

In connection with this assignment of error on appeal, it appears that a résumé of the pertinent portions of the instructions is called for. The Government respectfully urges that considering the instructions as a whole no error was committed by the trial judge in instructing on the various elements which the jury had to find in order to return a verdict of conviction. First of all, the Court

stated to the jury that "the duty of deciding the facts, questions of what the evidence proves, if anything, all of those matters of resolving the disputes of fact are matters for the jury * * *" [Rep. Tr. 419.] He continued:

> "But remember at all times that you are the sole and exclusive judges of the facts in the case, * * * just bear in mind that you have the responsibility to decide those facts and I do not. Hence, do not look to me for a decision on the facts, but take the law to be as I declare it." [Rep. Tr. 420.]

The Court also instructed: "It has been pointed out to you that a defendant is presumed to be not guilty and that presumption remains with him until and unless you believe from the evidence that he is guilty beyond all reasonable doubt." [Rep. Tr. 420.]

The Court then went on to advise the jury that the indictment provides the defendant with information as to the charges so that he could marshal his defense to the particular charges. He then also stated that the charges contained in the indictment and nothing else were the charges against the appellant. [Rep. Tr. 422.]

Judge Tolin then read the two counts of the indictment verbatim. Each count in effect charged that on or about a certain date, the defendant knowingly and unlawfully sold and facilitated the sale of a certain quantity of heroin, "which said heroin as defendant then and there well knew had been unlawfully imported into the United States." Thus, each and every element with which the defendant was charged was read to the jury in the exact language of the indictment. [Rep. Tr. 423.]

Thereafter, the Court read the statute, Section 174, Title 21 U. S. C. to the jury verbatim. By reading the statute, the Court called the attention of the jury to the basic elements of the crimes with which he was charged.

The statute, of course, provides for an offense for one who knowingly, among other things, sells, or facilitates the sale of any narcotic drug which was imported or brought into the United States contrary to law knowing that the said drug had been imported or brought into the United States contrary to law.

The Court then went on to read that portion of Section 174 which provides that: "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." [Rep. Tr. 423-425.]

Judge Tolin then went on to explain some general facts about the statute in that it covered many different types of narcotic drugs. He stated that a person might lawfully possess some of them and others are absolute contraband. He said that there was no right to lawfully possess heroin in the United States, but made the exceptions of some very rare circumstances. He then gave the jury some further background with respect to the enactment of the statute and the provisions of the constitution relating to certain police powers reserved to the individual states and stated that the United States, as such, does not have a general police power. He informed them then that if the United States has power to regulate heroin, it must be a power incidental to some one of the purposes of government which are delegated by the constitution to the United States, as distinguished from those reserved to the states.

> "The United States does have a right to govern imports and imported things. Therefore, the particular statute under which this offense is charged is one relating to imported heroin, and the jury must find that the heroin was imported in order to justify a conviction. * * *" [Rep. Tr. 424, 425.]

The Court then went on to explain the nature of a presumption. "A presumption is simply the acceptance of a certain state of affairs as being true until and unless there be evidence which shows that it is not rue. It is an inference which the law directs to be drawn from certain facts. * * *". The Court then gave the instruction which is objected to by appellant at page 57 of the opening brief; however, it is obvious that the Court there in connection with the defendant's knowledge of importation was explaining to the jury the basic grounds for jurisdiction of the United States over the importation of narcotics. Although he was also talking about the presumption which is contained in Section 174, he was actually giving the jury certain background facts relative to the power of the United States to govern "imports and imported things." [Rep. Tr. 425, 426.] The Court never told the jury that the presumption did not cover the question of knowledge and it is clear from the instructions as a whole that that element of the offense was covered by the presumption relating to possession of the drugs. He was in effect explaining to them that under the powers delegated to the United States pursuant to the constitution, if this particular heroin was not "unlawfully imported heroin," then there was no case for the jury because that was not a substance over which the government had any regulatory powers.

Judge Tolin stated "Hence, you are here to decide two cases only. The two cases that are set forth in the indictment, that is, the alleged August 28, 1956 charge and the alleged August 31, 1956 charge, and those are the only charges, and Mr. Bradford, the only defendant before you." [Rep. Tr. 426, 427.] As stated above, he had previously read the statute and charges verbatim, which included the element of knowledge of unlawful importation, and also that portion of Section 174 which stated that

possession would be sufficient to warrant a conviction unless satisfactorily explained to the jury.

Later in the instructions [Rep. Tr. 431], the Court explained to the jury that the presumption to which he had referred was that part of the statute which he had previously read authorizing the jury to convict if they found possession in the defendant, unless the possession were explained to their satisfaction. At that point, he stated that there are some proper possessions which the defendant could use to explain away his possession.

The Court then invited exceptions to the charge stating that "I sometimes forget things and this is the time the court shall ask the counsel to remind him." [Rep. Tr. 432.] At that time, counsel for appellant spoke to the Court: "About the presumption, your Honor, it says that would justify conviction. The presumption does not raise any inference there was an unlawful sale or facilitation of the sale." In answer to that statement, the Court then instructed the jury that: "In order for there to be a conviction in a case of this character, it is necessary there be proof there actually was a sale. There is no presumption there was a sale. You look to the evidence to determine whether there was or was not a sale. The presumption comes in to play only if the defendant is shown by the evidence to have had possession of the narcotic substance, if you find it to have been such." [Rep. Tr. 432.] Thus, it is obvious that the Court was indicating to the jury, considering the above quoted instruction and the instructions as a whole, that the only element of the crime which was not covered by the presumption was the sale. That would leave the unlawful importation of the drug and the knowledge of the defendant thereof the two elements which the jury would then have covered by the presumption relating to possession.

Judge Tolin then instructed the jury as to the fact that possession is sometimes actual and in other instances constructive, giving them a definition of constructive possession, "* * * where a person has dominion and control over a thing, having immediate ability to produce, handle or deal with it, but does not actually have it in his own hand." At that time counsel for appellant indicated to the Court that: "In the definition of 'possession', your Honor, I think you left out the element of intent." Thereupon, the Court stated to the jury "possession must be a *knowing, wilful* possession. (Emphasis ours.) No one is held to possess a thing, within the meaning of this law, if he doesn't know what he possesses. It is a *knowledgeable willing* possession which is intended by law." [Rep. Tr. 432, 433.] Thus, it was definitely established that the jury must find that the defendant had a possession that was knowing and wilful, thus eliminating inadvertence, accident or a mistake. [Rep. Tr. 433.]

Finally, counsel for appellant took exception "to the instruction that it is not necessary for the government to prove beyond a reasonable doubt that he had knowledge that the drugs were imported." [Rep. Tr. 435, 436.]

In the first place, it is submitted by the Government that there was no such instruction given by the Court and that a fair construction of the instructions as a whole showed the jury that the element of the defendant's alleged knowledge of the drugs was unlawfully imported was covered by the presumption which warranted a conviction on a showing of possession. In connection with the Court's instructions on knowledge of importation [Rep. Tr. 431] which had been mentioned in Appellant's Opening Brief, it also appears to be a fair statement that the first remark refers primarily to his original comments with respect to the jurisdiction of the United States to control the importation of narcotic drugs. The last part

of the sentence of the same paragraph [Rep. Tr. 431, 432] certainly was understood by the jury to have referred to the fact that the presumption covered the element of knowledge of importation, which was at issue.

Secondly, the appellant in posing an "exception" made no suggestion as to the basis or reasons of such exception but merely commented that the exception was taken to this alleged instruction. Furthermore, no different or related instruction on the subject of knowledge of importation was offered to the court, although the court had invited counsel, in effect, to submit any changes which should be made in the instructions.

Near the conclusion of the instructions the court also stated after conferring with the counsel that "The presumption that if heroin is found in the United States it is imported heroin is not conclusive." He went on to say "this law suit is open to the insistence by the defendant that this was, in fact, domestic and not imported heroin."

The court further instructed:

> "If you find some evidence that this heroin involved in the case, if you believed it to be heroin, if you find that it actually is heroin, if you believe from the evidence in the case that it was manufactured in the United States then there is no case against this defendant.
>
> "However, you must look to the evidence in this connection. The law suit must be decided upon the evidence before you and not upon surmise or conjecture." [Rep. Tr. 436-437.]

There was no further objection or exception taken by counsel with respect to that subject. The court explained that it was a rebuttable presumption. The practical effect of this evidentiary rule obviously was that

the government was not put upon its proof to actually prove unlawful importation and knowledge thereof. And the court made it clear that the presumption did not cover the element of sale. Hence all the instructions covered the elements in the indictment of unlawful importation and knowledge thereof; the jury knew the government could rely upon this presumption for those two factors. That the defendant could rebut the presumption was made clear by the instructions.

Referring to our previous statement of the issues herein, the theory of the prosecution was to establish by proof (1) the facts of the two sales and (2) the knowing possession by appellant of the heroin. It appears appellant attempted to show that even if there were lawful sales he did not have possession of the heroin. He further attempted to rebut the presumption which arises upon a proof of possession, by showing that the heroin involved could have been produced from lawfully imported opium or synthesized in this country. Therefore, it appears that the issues as shown by the evidence, opening statements and argument of counsel were whether or not there were unlawful sales, or an unlawful entrapment in each case, and whether or not the heroin was unlawfully imported into the United States. Of course, the latter issue turned on whether or not the government proved "possession" as required by the statute. As stated above, appellant had offered evidence of a "chemical possibility" that the heroin could have been derived from synthesis and also attempted to show that it might have been manufactured from lawfully imported opium. This evidence was tendered in rebuttal to the presumption on the question of whether or not the heroin in the case had been unlawfully imported.

Since the defendant had attempted to rebut the presumption by endeavoring to show that the heroin was not unlawfully imported, it is obvious that the Judge

was instructing the jury on all of the real issues which were litigated in the case as shown by the evidence and framed by the opening statements and arguments of counsel. The Court told the jury that they must find sales, must find knowing possession, and must find that the heroin had been unlawfully imported. Even though knowledge of importation is an element of the offense, it was established by proof of possession, as the jury was, in effect, instructed. The jury's verdict under the instructions necessarily found that the sales had been consummated and that the defendant had possession of the heroin. Obviously, they had made a finding that the heroin had been unlawfully imported and rejected the defense theory that it came from a "domestic" source. Thus, they followed the presumption which in itself established the knowledge of unlawful importation.

Even if it could be said that the Court's instruction was not a clearly exact statement of the law, it was not prejudicial because it did not pertain to the issues properly litigated.

The courts have held that the defendant cannot merely make a bald denial or show "guilty" knowledge in rebutting the presumption. In the case of *Rosenberg v. United States,* 13 F. 2d 369 (9 Cir., 1926), this Court discussed the rebuttable presumption in Section 174.

> "In no way is there compulsion that defendant shall testify. He may produce witnesses who may truthfully and without difficulty satisfy the jury that his possession was had in an *honest* and *legitimate* way. He may rely upon circumstances developed by the evidence of the prosecution as negativing unlawful possession, or he may himself testify and explain how he became possessed of the drug."

This Court went on to quote from the case of *Yee Hem v. United States, supra,* as follows:

> " 'legitimate possession, unless for medicinal use, is so highly improbable that, to say to any person who obtains the outlawed commodity, 'since you are bound to know that it cannot be brought into this Country at all, except under regulations for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut the natural inference of lawful importation, or your knowledge of it' is not such an unreasonable requirement as to cause it to fall outside the Constitutional Power of Congress.' "

The case of *United States v. Feinberg,* 123 F. 2d 425 (7th Cir., 1941), also holds that "the explanation of possession, however, if it is to serve the defendant's purpose must not only be believed by the jury but must also be one that shows a possession lawful under the statute." In other words, such *lawful* possession tends to show that the narcotics were not imported contrary to law or defendant had no knowledge of such unlawful importation. If this is a correct statement of the law, then it is obvious that the defendant has not been prejudiced by the instructions in this case. There was absolutely no evidence offered by the defense to prove that this defendant got possession of the heroin in an "honest and legitimate way" and, therefore, as a matter of fact, no rebuttal was given to the presumption on the question of knowledge of unlawful importation, which presumption was relied on by the Government to authorize conviction.

From the foregoing, it appears that the only defense, in effect, which can be offered to rebut the presumption on the fact of knowledge of unlawful importation is an explanation of *honest* and *legitimate* possession. Of course, such evidence would also tend to rebut the fact of unlawful

importation. However, this Court in the *Caudillo* case approved instructions which also allowed a defendant to present a defense to rebut the fact of unlawful importation, proved by the presumption, through circumstantial evidence that the Marihuana was domestically produced. The opinion indicates it was not offered to rebut the fact of knowledge, but of unlawful importation, and is the same type of defense which was presented in the within matter. Since the Government must prove both unlawful importation and knowledge thereof, such evidence to rebut the one fact of unlawful importation could *conceivably* be the basis for a verdict of acquittal, if believed by the jury, without going into the question of knowledge. However, it is urged that if the defense is also attacking the presumption on the issue of his knowledge of unlawful importation, then he must make the "lawful" possession showing required by the *Rosenberg* case, *supra*. This is a logical requirement under the well known facts of the illicit narcotics traffic in the United States. Proof of "lawful" possession is the only defense which would, under all the circumstances, have any reasonable tendency to rebut the presumption on the fact of knowledge.

(c) The Trial Court Did Not Err in Its Instructions With Respect to Rebutting the Presumption.

With respect to appellant's contention that the judge erred in telling the jury that unless the possession of the heroin was "lawful" the appellant could not successfully rebut the presumption, the Court instructed the jury that "* * * if you find that it actually is heroin, if you believe from the evidence in the case that it was manufactured in the United States, then there is no case against this defendant." [Rep. Tr. 437.] Thus, it appears that the Court was recognizing a defense tendered by the appellant, as was discussed in the preceding section, that is, that the heroin might have been synthesized in this country or ob-

tained from lawfully imported heroin in the United States. Anyway, the presumption is not unconstitutional if it could be said that the only defense to rebut knowledge relates to "lawful" possession, because of the well-known facts and circumstances surrounding the illegal traffic of heroin. In this situation, the fact that Congress created a presumption which can only be rebutted by a showing of legitimate possession, is not unreasonable or arbitrary. It is well known that almost all of the heroin which is in this country is the result of unlawful importation, since it is contraband except for having possession under certain strict conditions. However, the appellant does have the opportunity to show a lawful possession if it happens that his is the rare occasion in which an "honest and legitimate" possession had been obtained. Obviously, if such a possession were explained to the satisfaction of the jury it would indeed negate the unlawful importation or knowledge thereof. As stated previously, that is why there is a considerable amount of language in the cases which discussed a "lawful" possession to the effect that the appellant can rebut the presumption relating to unlawful importation and knowledge thereof. Counsel for appellant remarked that the *Feinberg* case can be "taken to mean" to comment to a certain effect. However, the language of the *Feinberg* case at page 427 was not a comment but a holding in the case.

In *United States v. Moe Liss,* 105 F. 2d 144, the Court of Appeals for the Second Circuit also held, as did the Court of Appeals for the Seventh Circuit in *Feinberg,* that the explanation of possession must be one of a "lawful" possession. The Court stated at page 146, "So it is accurate to say that the explanation of possession, if it is to serve the appellant's purpose, must not only be believed by the jury but must also be one that shows a possession lawful under the statute * * * it goes without saying that Congress did not intend that an explanation which shows

guilty knowledge by the appellant would suffice." The Court then went on to distinguish *United States v. Turner,* 65 F. 2d 587 (2d Cir., 1933), by saying that the particular charge was erroneous, as shown in the final sentence of that opinion. It might be noted in passing in the *Turner* case, the Court stated that the question for the jury was whether or not the appellant received the heroin for a lawful or unlawful purpose at the time; by inference the Court was saying that lawful possession in the appellant in that case could have rebutted the facts proved by the presumption, that is unlawful importation or his knowledge thereof.

At any event in this case the Court did recognize in the instructions one of the issues litigated in the case, that is, whether or not the heroin, according to the appellant's theory, could have come from a "domestic" source. There was no explanation that his possession was "honest" or "legitimate." Therefore it is difficult to see how he could have been prejudiced by any of the Court's instructions if this Court holds that the only explanation to rebut knowledge of unlawful importation is one of a "lawful" possession. There was no evidence before the jury which even hinted that the appellant had obtained the heroin honestly or legitimately; in fact the appellant admitted that he made the sales of heroin, contending that he had been entrapped, and, further, that he had not had possession of the drugs.

In conclusion, it is submitted that law is to the effect that the only defense which can be tendered by an appellant to rebut the fact of knowledge proved by the presumption in Section 174 is one which shows an "honest and legitimate" possession. This is true because of the reasonable inference to be drawn from all the facts and well known circumstances surrounding the illegal traffic of heroin. Almost all of the heroin which is concerned in such traffic comes from foreign sources and is not synthesized in this country and is not derived from opium law-

fully imported into the United States. In view of that, it would be unrealistic to say that the appellant could come in and make a bare denial of importation or state that he did not know whether or not the drug was imported. The facts involved in the traffic of heroin do not support the reasonableness of contending Congress intended to allow such a defense. If the appellant is one of those individuals who can prove he has an explanation to satisfy a jury got the heroin in a rare circumstance honestly and legitimately, then Congress and the decision of the Courts obviously shows he has his opportunity to prove such possession.

Appellant was allowed the opportunity to prove the lawfulness of the importation of the opium from which the heroin was derived or its domestic synthesis and the instructions so informed the jury. He said that there will be no case against the appellant if they found that the heroin had not been lawfully imported. Thus, the appellant cannot claim that he was prejudiced in any way by the instructions.

(d) Instructions With Respect to Possession Were Not Erroneous.

Appellant's argument with respect to his instructions quoted at pages 68 and 69 of his brief seems to have in mind a different factual situation, as indicated by the cases he cites, than the evidence which was developed in this case. *Willsman v. United States,* 286 Fed. 852; *United States v. Pisano,* 193 F. 2d 355; *United States v. Maroy,* 248 F. 2d 663, and *Wall v. United States,* 65 F. 2d 993, all involve cases where possession was *proved* to be in one person and *that* possession was ascribed to the various appellants.

As the appellant admits in his opening brief at page 77, "as for possible association with Pat, in selling narcotics, the evidence is completely lacking. The government did

not establish who Pat was, nor was the appellant ever seen in the presence of the deliverer."

There was little evidence in the case with respect to "Pat" and certainly possession of the narcotics was never proved to be with him. He was merely mentioned as Bradford's "connection" but there was nothing to show that he was ever upon the scene of any of the transactions mentioned in the trial. The question was not whether the possession of some one else would be imputed to Bradford, but whether or not appellant had possession as required by the act. We will assume that the appellant got the heroin from some place, at some time, before the agent was able to pick it up from the spot to which he was directed, but the evidence does not show that anyone else had possession, either constructive or actual, during any of the times when appellant and Agent Farrington were at or near the narcotics. If it had been shown that some other party had such possession, then the question might have arisen as to whether the other person's possession could be made the possession of Bradford. However, such is not the case.

Appellant is the one who made all of the negotiations for the sale of the two quantities of heroin involved in this case and he made them in the usual devious fashion employed by those constantly engaged in the illegal traffic of heroin. He was not a man merely working as a broker or making an introduction or vouching for the seller, but he was the actual moving party who undertook to carry out the sales and make the delivery of heroin.

In the first transaction, appellant took care of all the arrangements for the sale of heroin, fixed the price, took the money, and directed the agent to the place where the delivery would occur. The appellant even stated that he was going to do something he didn't want to, that is go to the agent's "hand," which means in the illicit traffic of narcotics, that the delivery would be made "hand to hand." When the agent actually arrived at the location described

to him the narcotic was found directly beneath the rear wheel of appellant's vehicle which was parked in the street. There was no justification for an assertion that anyone else had possession of the narcotics at that time but appellant. When the agent arrived appellant had absolute control and dominion over that quantity of the drug.

During the second transaction, again appellant made all of the negotiations, fixed the price and led the agent to the palm tree where the heroin was picked up by Farrington. Again, there was absolutely no evidence to show that anyone else had possession at that time and the only reasonable inference from the evidence was that the appellant had absolute control and dominion over that particular narcotic.

That part of appellant's proposed instructions starting at page 68 of his opening brief to the effect that the question of possession "of another person," could not be deemed "possession in the appellant unless a conspiracy is established between such person and the appellant," is completely inapplicable to the evidence in this case and therefore not a proper instruction to the jury. There are no facts from which the jury could have drawn an inference that someone else had possession of the heroin at the pertinent times involved in the two transactions.

The remainder of the instructions at page 69 of the opening brief is so confusing that it is difficult to determine who is being referred to in connection with "acting as a simple intermediary or procuring agent." It is so ambiguous that the instructions could refer to in that context either to the appellant or to the alleged "third person."

The Court instructed the jury: "Now, in this matter of the sale of heroin, if a person far removed from the supply of heroin, either actual or constructive, simply acts as a broker, then that person must have absolute knowledge and control over the situation in order to be so guilty." When considered in connection with instructions given on the

subject of direct and constructive possession, it is clear that the instructions correctly stated the law as applicable to the facts of this case. [Rep. Tr. 435.]

As we have noted above the Court read the presumption [Rep. Tr. 431] which is contained in Section 174 and then went on to state [Rep. Tr. 432] that the jury had to find proof that there was actually a sale, since there was no presumption that there was a sale under each count of the indictment. It was also stated that the presumption only came into play if the defendant was shown by the evidence to have had possession of a narcotic substance.

Judge Tolin then instructed: "Now, possession is sometimes actual, as where a person holds a thing in his hand. Possession in other instances is constructive, as where a person had dominion and control over a thing, having immediate ability to produce, handle or deal with it, but does not actually have it in his own hand." [Rep. Tr. 432, 433.]

It was then said: "Possession must be a *knowing, wilful possession.* No one is to be held to possess a thing, within the meaning of this law, if he doesn't know what he possesses. It is a knowledgable, willing possession which is intended by law." [Rep. Tr. 433.] (Emphasis ours.)

It should be noted that there appears to be no objection made by appellant to the definition of actual and constructive possession.

Counsel for appellant at page 92 to page 96 of his opening brief has cited certain cases in connection with his argument on possession which involve possession of stolen property, possession of a dangerous weapon, and possession of liquor. However, it is to be noted here that this Court in the *Caudillo* case, *supra,* discussed the question of possession and mentioned the *Tot* case. The latter case involved the question of possession of firearm or ammuni-

tion in constituting presumptive evidence that a violation had occurred under the Federal Firearms Act. This Court stated that the difficulty with Caudillo's reliance on the *Tot* case was that it provided no precedent since it was *a factually different case*. Thus it is hard to see how any question of possession could be determined by an analogy to cases involving the possession of liquor or firearms or of any other offense outside of the violation of the law relating to illegal traffic of narcotics.

It is inconceivable that Congress could have had in mind a type of possession which would only be in the hand of the defendant or on his person, that is "actual" possession of the narcotics. This is true because of the well known facts surrounding the devious fashion used by those who negotiate for the illicit sale of heroin. None of the persons who engage in this traffic wish to be caught with the narcotics in their hand and devise many different schemes for delivery of heroin by placing it at curbs or behind bushes or underneath trees or underneath the wheels of automobiles. It is difficult to comprehend how anyone could seriously contend that actual possession in the hand of the defendant would be necessary before a conviction, using the rule of evidence contained in the presumption, could be obtained. If that were true, a "drop" underneath or beside or behind a convenient landmark would be sufficient to put the Government on proof of implication and knowledge thereof. It is ridiculous to say that Congress should intend that such an obvious device, one used commonly in the illegal traffic of narcotics, should be without the purview of the presumption.

In *Brown v. United States,* 222 F. 2d 293 at 297, this Court said:

> "In *Mullaney v. United States,* 9 Cir., 1936, 82 F. 2d 638, 642, this Court approved an instruction of the trial court that 'possession of a thing means having

in one's control or under one's dominion.' It is not necessary that possession be immediate or exclusive. *Mullaney v. United States, supra; Borgfeldt v. United States,* 9 Cir., 1933, 67 F. 2d 967."

(e) The Trial Judge Adequately Instructed the Jury on the Credibility of the Appellant as a Witness on His Own Behalf.

The government calls the court's attention again to the fact that the court instructed the jury at the inception of his charge "Hence, I cannot say to you properly that the defendant is thus and so, saying guilty or not guilty. That is for you to say. I cannot properly say to you such and such a witness is not to be believed and such a witness is to be believed. Those are questions for you." [Rep. Tr. 419-420.]

The entire instruction on witnesses, part of which was not included in Appellant's Opening Brief, is as follows:

"Witnesses who come to the witness stand and are sworn are presumed to testify to the truth, but that presumption may be overcome by anyone of many things. It might be overcome simply by the manner in which a witness testifies, the manner in which the witness acts. The jury is here to observe the witnesses, to size them up, to determine which ones are creditable and entitled to belief and which ones are not. The jury should look to whether the witness' testimony is consistent, whether it holds together, whether there are contradictions in it, whether the testimony of a witness harmonizes with other evidence which you accept or whether it is in contradiction to other evidence which you accept.

"The defendant is like any other witness. You should not judge his testimony by any other standards.

> "But as to all witnesses, look to see what their interest is in the case. Look to see any point of vantage in observing what they claim to have observed. Look to see what they have to gain or to lose by the testimony which they have given. Consider their hopes, their fears, their purposes of justification, their power of observation, how it was applied, their honesty, their integrity. You may consider also whether or not they have been convicted of a felony.
>
> "But all these things come down to simply providing for the jury a means by which you analyze the testimony of the witnesses."

It was clear that the defendant was not singled out in the instructions, but the judge was cautioning the jury on the criterion to use in judging *every* witness. The cases set forth by appellant do not apply to the facts of this case. For instance, in quoting from the *Malaga* case at page 131 of the opening brief, reference was made to a statement of facts obviously not in evidence, since an argument had been made there with respect to facts which were not in the record, to an "argumentative discourse, a repeated assertion that the respondent or other witness is not telling the truth, or a direct or indirect instruction that a respondent in a criminal case is guilty." However, all these things are completely outside of the instructions which were given by Judge Tolin. The jury was not told that Bradford's testimony was inherently improbable or that it was obviously corrupt or false. This is a sheer exaggeration of the actual facts. The court did not surround the defendant's testimony with "an aura of suspicion," but, in effect, told the jury to use their common sense in using all of the considerations named in evaluating the testimony of the defendant and "all witnesses."

(f) The Trial Judge Did Not Wrongfully Refuse to Instruct the Jury on Failure to Produce a "Material" Witness.

In connection with this point, appellant has based his entire argument on two erroneous assumptions. First of all, that the person named "Bobbie Hawkins" was a *material* witness and secondly, that a showing had been made by appellant at the time of trial that the defense could not locate this person.

Considering the last assumption first, it must be kept in mind that it does not appear the defendant testified or offered any evidence to show that a search had been made on his behalf or by him for Barbara Hawkins and that such effort had been futile. The only statement was one made by appellant sitting at counsel table wherein he interrupted Government Counsel's closing argument by saying from the table where he was sitting "I tried to find her, but I couldn't." [Rep. Tr. 408-409.] This outburst at the close of the case could not be accepted as any showing on appellant's part as to the unavailability of the witness to the defense. The affidavit attached to the Opening Brief before this court is improperly submitted as a part of the record since a showing had to be made during the trial itself of any search, and the adequacy thereof, for a "material" witness.

It will be noted that some mention was made of Barbara Hawkins in connection with the defense of entrapment out of the hearing of the jury. [Rep. Tr. 112.] Judge Tolin stated to him "If you desire the presence of that person as a witness I will issue a Writ of Habeas Corpus Ad Testificandum to compel the presence of that person in court." [Rep. Tr. 113.]

No request was ever made by appellant for such a writ for the presence of "that person" in court as a witness.

Any time spent in arguing the trend of authority in presumptions where a "material" witness is not produced at trial is to of no avail when there is no showing that the witness was "material." The proposed instruction makes the same blunder in that the witness was not material at all.

There was no contention in the argument, nor was it developed through the evidence, that Barbara Hawkins did more than introduce appellant and Agent Farrington. All of the other transactions which were vital in the within trial were outside of the presence of Barbara Hawkins and at some distance from her residence. This is true also of all of the conversations which took place in connection with these transactions. Upon examining the transcript [250-253], counsel was aiming the entrapment defense solely at Agent Farrington, who was then using the name of "Ben." For instance, the statement was made that certain things were done by the appellant "* * * at the instigation and direction of 'Ben' * * *" [Rep. Tr. 251.] It is apparent that appellant has taken an entirely different tack in his opening brief with respect to the alleged material witness, Barbara Hawkins, than he originally did in trial and one which is not warranted by the evidence.

The defendant took the stand and testified in his own behalf with respect to his version of the original meeting with Agent Farrington, among other things. He stated that they met at the Bobbie Hawkins apartment where the agent was introduced to him as "Ben Allen." There was no contention by the defendant himself that anything further was said much more than "general conversation; an introduction." It appears from the remainder of the transcript, including the rest of the defendant's testimony that there was no other evidence that she had anything further to do with the transaction between appellant

and the agent than the introduction which was made in her apartment. In other words, they were free of any participation of the person called Barbara Hawkins.

There is absolutely no showing of any facts which would cause this Court to say that the Government had refused to call a material witness and the instructions involving this refusal had been in error. There is no showing that the Government could have anticipated that the witness would be necessary to either party at the trial or that, as stated above, the appellant could not have found her. The affidavit which is attached to the opening brief would not now afford the Government an opportunity to bring the witness into court to testify; but, the important point is that the witness was not "material."

4. No Misconduct Was Committed by the Assistant United States Attorney.

(a) No Error Was Committed During the Government's Closing Argument.

The Government calls the Court's attention to a part of the closing argument which is not contained in defendant's opening brief. Government counsel stated:

> "The Government is not contending that because the subject matter of the case is narcotics, that that alone is sufficient to warrant a conviction. That is, of course, not true. What the Government contends in this case is that the facts so inescapably lead to the conclusion that the defendant is guilty as charged in both counts that there is no real issue." [Rep. Tr. 379.]

Later, during the closing argument, Government counsel said:

> "The Government welcomes the burden of proof which the law places on us, which is to prove the

defendant guilty beyond a reasonable doubt. The reason I mentioned that, ladies and gentlemen, is because in this case, there is no doubt, there is absolutely no doubt under the evidence that this defendant sold those narcotics and that he had possession of them." [Rep. Tr. 409.]

Subsequently, Government counsel also stated:

"* * * He is guilty under the indictment, ladies and gentlemen, and counsel had admitted he is morally guilty. The Government says he is also *guilty under the law.*" [Rep. Tr. 412.]

It was then stated, as indicated and objected to in Appellant's Brief, that:

"* * * *in this particular case,* ladies and gentlemen, it is submitted *that the facts that have been given to you from the witness stand,* that if your verdict is not guilty on each count, there would be a travesty of justice."

Government counsel went on:

"*talking about the facts of this particular case,* ladies and gentlemen, if your verdict, *under the circumstances which have been testified to in this court on this case,* is not guilty, ladies and gentlemen, the effect of the law will be nil completely. Absolutely, it will end federal control of narcotics."

During the entire extent of Government opening and closing argument there was no language such as quoted in the opening brief in connection with certain remarks which have been held prejudicial during argument in other cases. There was no appeal to the jury that if they went home, their neighbors would feel they had been bribed or otherwise importuned to return a certain type of

verdict. There was nothing said that if the verdict in the case was not guilty, regardless of the facts of the case, the control of narcotics would be gone. It was not suggested that the importance of control of the illegal traffic of narcotics was such that the defendant should have been found guilty regardless of the evidence in the case. The only statement that was made was that *under the facts of the case,* the verdict should have been one of guilty. The whole gist of the argument to which appellant had complained was that the *evidence in the case showed the defendant to be guilty* beyond any reasonable doubt. During our argument, the burden of proof was carefully pointed out to the jury and the facts were called to their attention that the defendant had been extremely well represented by counsel and that he had apparently been afforded a fair trial. There was no appeal to passion or prejudice or emotionalism made to the jury, at least during Government counsel's argument.

It is to be noted that in connection with the alleged misconduct of Government counsel in connection with the closing argument, Judge Tolin stated in answer to this complaint.

> "Do you think the jury understood that is what she was saying, that the whole federal system of enforcement of narcotic laws would fall unless this man were convicted?"
>
> "She had not contended that he was the pivotal figure in the entire fabric of narcotics vending in the United States. I think what she was undertaking to say—and what the jury understood she was undertaking to say—was that if a case with evidence as substantial as the evidence in this case is, is not worthy of conviction, then no case brought under this statute is. And the evidence in this case was certainly abundant."

After that was said, the counsel for appellant stated that it had been a close case in his opinion. [Rep. Tr. 455-456.] Judge Tolin then went on to say in connection with that remark and the part of the closing argument which has been objected to:

> "It was a little enthusiastic, Mrs. Bulgrin. It would have been better to have not included it, I think, as a matter of taste, rather than of importance on the legal side of the case or consideration of the factual.
>
> "But, I undertook to thoroughly instruct the jury. And I can't see any point in the statement it was a close case. The jury was out about—was it four hours?"

Judge Tolin then later went on to say:

> "It has been my experience as a Trial Judge that the juries rarely return verdict in less than four hours." [Rep. Tr. 467.]

(b) The Assistant United States Attorney Did Not Commit Misconduct by an Interruption of Appellant's Opening Statement to the Jury.

At the beginning of appellant's case, his counsel elected to make an opening statement. After he had made certain remarks with respect to the lawful importation of opium, the lawful manufacture of morphine, the synthesization of morphine and heroin and certain other matters, Government counsel interrupted him to state to the Court that the opening statement for defendant seemed to pertain to matters of law which were argued before the Court in connection with a constitutional objection previously presented. We contended that they were not proper considerations for the jury. [Rep. Tr. 244-246.] The Court stated that the defendant was not arguing the constitutionality of the section and defense counsel stated that he

did not mean to be making such an argument. Both of these statements were made in the presence of the jury. The Court subsequently commented:

> "Maybe he is going to have a whole chain here with many links in it, and if so, he is entitled to describe each link.
>
> "So far, the opening statement has tended to be the description of one link in what might possibly be a chain; I can't tell. He has the floor. I am going to let him continue."

Government counsel was obviously overruled on her contention in front of the jury and the Court permitted counsel to continue with his argument. During the colloquy between Court and counsel, it was apparent that the Government's objection was merely based upon the fact that these were matters to be presented to the Court outside of the presence of the jury. This contention was rejected in the presence of the jury and could have lead to no other inference but that the appellant had the right to continue with his theory of defense, which the opening brief states he was outlining as matters which would be developed in the trial. It is difficult to understand how appellant can contend that any of the remarks which were made in this particular instance were of any prejudice to the defendant, or, in fact, were in error at all. The matter was resolved favorably to the appellant and the plain implication was that he could continue with the trend of his statement. Perhaps, with hindsight, the interruption should not have been made, but, as the Court stated, it was not serious. The other remarks of the Court [Rep. Tr. 248] with respect to the advisability of the interruption or the development of the statement were made outside the presence of the jury. However, it was obvious that defense counsel could continue to the extent he thought proper.

Conclusion.

In conclusion, it is submitted that the verdict below should be affirmed. The Trial Judge did not err in denying the Motions for Judgment of Acquittal. The Government will not repeat any of the above matters again which would be in support of the denial of said motions but will only state that, not only was the Court entitled to construe the evidence most favorable to the Government in considering such motions, but under the law was warranted in the denial.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

LEILA F. BULGRIN,
Assistant U. S. Attorney,

Attorneys for Appellee, United States of America.